Filed 8/31/12 P. v. Gomez CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GERARDO PINEDA GOMEZ, Defendant and Appellant.	H036452 (Monterey County Super. Ct. No. SS072582)

Defendant Gerardo Pineda Gomez appeals from a judgment of conviction entered after a court trial in which he was found guilty of two counts of attempted premeditated murder (Pen. Code, §§ 664, 187, subd. (a) - counts one, three),[1] two counts of assault with a firearm (§ 245, subd. (a)(2) - counts two, four), shooting at an occupied motor vehicle (§ 246 - count five), two counts of street terrorism (§ 186.22, subd. (a) - counts six, 10), attempted solicitation of murder (§§ 664, 653f, subd. (b) - count seven), dissuading a witness by force or threat (§ 136.1, subd. (c)(1) - count eight), and attempted solicitation of a crime (§§ 664, 653f, subd. (a) - count nine). With respect to counts one, two, three, four, five, seven, eight, and nine, the trial court found that the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)). With respect to counts one and three, the trial court found that at least one principal intentionally and

[1] All further statutory references are to the Penal Code unless otherwise noted.

personally discharged a firearm at a person other than an accomplice (§ 12022.53, subd. (c)). With respect to count one, the trial court found that at least one principal intentionally and personally discharged a firearm at a person other than an accomplice and proximately caused great bodily injury (§ 12022.53, subd. (d)). The trial court also found true the allegations that defendant had suffered a prior strike conviction and a prior serious felony conviction (§§ 1170.12, subd. (c)(1), 667, subd. (a)). The trial court sentenced defendant to a determinate sentence of 25 years and a consecutive total indeterminate sentence of four life terms with a minimum eligibility for parole after 77 years.

On appeal, defendant contends: (1) there was insufficient evidence to support the trial court's findings on the "primary activities" and "pattern of criminal gang activity" elements of the street terrorism and gang findings; (2) the indeterminate sentence imposed on count eight must be reversed due to the prosecution's failure to allege it in the information; and (3) the abstract of judgment must be corrected to reflect that the total indeterminate sentence is 67 years to life and that he was convicted in count nine of attempting to violate section 653f, subdivision (a), not section 653f, subdivision (b). We reject defendant's first two contentions, but we agree with defendant that the abstract of judgment must be amended. In all other respects, the judgment is affirmed.[2]

I. Statement of Facts

On September 2, 2007, Raul left work at 7:00 p.m. and picked up his girlfriend Taji in his van. After eating at Super Taqueria, they went to his cousin's apartment complex where Raul intended to take a shower. They arrived at the parking complex at

---

[2] Defendant has also filed a petition for writ of habeas corpus which we have considered together with his appeal. We dispose of his habeas corpus petition by separate order.

about 10:00 p.m., and Raul parked the van in a marked space. The area was "pretty dark."

Raul and Taji moved to the back of the van to get some clothes. Raul could see clearly out of the van. He explained that someone outside the van could only obtain a "blurry" view when looking inside because the van had privacy glass on the side windows. Raul looked out the side window and saw a Cadillac, which was "dark . . . like a root beer color" or "like a gold and brownish" with a red interior. The Cadillac pulled in behind Raul's van. If Raul had backed the van out of the parking space, he would have hit the rear passenger side of the Cadillac. Raul recognized the make of the car as soon as it drove in, stating, "I pretty much know my cars. I love cars."

Raul saw five males in the Cadillac. Two of them exited the Cadillac. A man with a mustache and a dark, horizontally-striped shirt approached the van and looked in the window with privacy glass. The man cupped his hands, put them on either side of his eyes, and leaned forward. The man stood outside the van for a minute to a minute and a half. When Raul was asked whether he saw this person in court, he testified that defendant did not look the same.[3] However, he identified a photograph of defendant, which was taken on the night of his arrest, as the person who looked into the van on the night of the shooting.

When the man asked who was inside the van, Taji responded, "Are we in your parking?" Raul had a "bad feeling" and was about to move to the front of the van, when the man said, "Hebbron." The man stepped back and tapped the arm of the man next to him. Six shots were fired into the van. One bullet grazed Raul's rib cage and another lodged in his leg. A bullet also grazed Taji. Taji drove Raul to the hospital.

---

[3] At trial, defendant was clean shaven and wore glasses.

Raul was unable to move his leg for a week and a half, and he could not walk without crutches or a cane for two months. He can no longer run because his leg gives out, and he lost his business.

At 11:22 p.m. on the night of the shooting, Officer Chris Balaoro was on patrol when he saw a dark gray-colored Cadillac. He stopped the vehicle because it matched "the color" and "the description" of the vehicle used in the shooting. Defendant was in the right front passenger seat. Nestor Gomez was the driver and Julio Reynoso Rodriguez was in the rear right passenger seat. Defendant was arrested and transported to jail. Photographs taken at the jail reveal that defendant had "Hebbron Street" tattooed on his legs, and "Most Hated," "Salinas," "HBN," "ST," and "13" tattooed on his back. Defendant indicated on the jail intake form that he was a Sureno and a member of Hebbron.

The police did not show Raul a photographic lineup. However, a few days after the shooting, Raul saw a newspaper article about shootings in Salinas that weekend. The article included defendant's photograph. According to Raul, defendant's photograph "matched the one that was in [his] mind" of the man who had been looking into the window of his van. Raul also noted that defendant was wearing different clothes in the newspaper photograph than at the time of the shooting. Raul did not read "too much" of the article.

Raul received monthly payments from a governmental agency regarding his appearance as a witness, but he did not know how much money he had received or for how long. He received some money to fix his vehicle at the end of 2007 or the beginning of 2008, and he was still receiving financial assistance at the time of trial. He was not led to believe that this financial assistance required him to testify in a certain way or to identify a particular person.

On June 15, 2008, Deputy Shaun Moran was working in the Monterey County Jail. He was taking inmates from C pod to the visiting area. After he unlocked the cell

doors, he watched one inmate hand an item to defendant, who put the item in his pocket and adjusted his sock. Deputy Moran searched defendant and found a pencil in his pocket and two handwritten notes in his socks. After defendant waived his rights, he asked Deputy Moran "to give him a break," and told him that he had written the notes "to put his thoughts down on paper." Defendant's visitor that day was Joanna Arreola, who visited defendant on a regular basis.

One of the notes was a directive to either murder or intimidate Raul and Taji. It stated: "Tell soldier & Chaps we go to jury in 8 days and no one was able to do nothing for [me]. I need you if possible to blast them you can tell Creeper from the hood lives on California Street Chaps knows him he'll do it. [I]f this can't be done for whatever reason at least have a couple of the homies approach the Vato and hyna or any of them and tell them straight out 'if you testify against my homeboys we are gonna smoke you' and flash em a strap callem by their names Raul and Taji. This has to be done mandatory right away. If they testify me and tiny will get life help us out this is the last time I tell you guys I expect you to do it. If we do go to jury on June 25 I want homies to go to our court."[4]

The other note was directed to "Nestor," "Dad," and an unnamed third person. The note outlined an alibi for the night of the shooting and indicated that the witnesses were to "stick to the same story."

Joseph Merydith testified as an expert in questioned documents. In his opinion, defendant "probably" wrote the notes found in his socks. He explained that the "probably" standard "in real generic layman's terms, means that probably this person executed this writing, probably nobody else did. To say that probably the sun will rise tomorrow, to put it very generically."

---

[4] When the notes were found in defendant's socks, he had a jury scheduled for June 23, 2008.

While defendant was incarcerated at the jail, his telephone calls were recorded between September 4, 2007 and June 16, 2008.

On September 4, 2007, defendant spoke to Bebe. He told Bebe to tell Coco to tell Luis that "someone will try to visit him" and "make sure he tells him not to panic . . . because after all, we didn't do anything." Defendant further directed that this individual be told "not to take time, to fight, to fight, and to tell his lawyer that it wasn't him." During this conversation, Bebe read a newspaper account of the shooting. Bebe referred to one witness as "that stupid bitch." Defendant responded, "Yeah, the, the one who hangs out over there, man?"

On September 4, 2007, defendant also spoke to Jesse. Defendant told him that "they don't have anything. It's just, just her that's singing and that's it." In another call that day, defendant told Nestor to "bring a pencil and paper."

In a call made between September 2, 2007 and October 10, 2007, defendant asked "UM2" whether he had received a paper from Arreola. UM2 replied that he "already gave it to the soldier."

On June 15, 2008, defendant spoke with Arreola. She told defendant that the police "got the letters" that defendant had sent. When defendant asked if anyone had come with her, she replied that no one had, and that she "kept on calling him and like they would just pick up the phone and like they wouldn't answer."

In another call on June 15, 2008, defendant spoke to an unidentified male and appeared to discuss the seizure of the notes found in his socks at the jail. Defendant asked about a possible charge "if they get someone here inside with a paper that says that they want to give candy to, to, to, something, someone." The unidentified male stated that "it could be intimidating a witness or for you to kill somebody they're going to fucken [*sic*] conspiracy to commit murder."

On June 16, 2008, defendant spoke with an unidentified male. Defendant said, "Everything was looking good from that. I blew it." He directed the man to "[t]alk with

Luis stupid, talk with him stupid. And, and, and I want, want to put on the batteries, stupid, okay. You know what you guys have to do okay?"

Officer James Knowlton, who was assigned to the gang unit of the Salinas Police Department in 2007, registered defendant on April 7, 2007, as a gang member. At that time, defendant told him that he claimed Hebbron Street, a Sureno criminal street gang in Salinas.

Officer Balaoro testified as an expert in the area of gangs, including gangs in Salinas and Sureno criminal street gangs. He testified that the primary activities of a Sureno criminal street gang are car theft and drug sales in order to buy guns. He also identified two crimes committed by Surenos. Hugo Chavez and Hugo Cervantes committed an attempted murder on February 25, 2007. On July 28, 2005, Uriel Martinez committed a shooting. Both incidents resulted in convictions for attempted murder.

In Officer Balaoro's opinion, defendant was an active Hebbron Street gang member in September 2007. He also testified that Julio Rodriguez was an active Hebbron Street Sureno gang member and Nestor Gomez was a Hebbron Street associate. Officer Balaoro opined that both the shooting and the solicitation offenses were committed for the benefit of the gang.

II. Discussion

A. Sufficiency of the Evidence

Defendant contends that there was insufficient evidence to support the "primary activities" and "pattern of criminal gang activity" elements of street terrorism (§ 186.22, subd. (a)) and the gang enhancement findings (§§ 186.22, subd. (b), 12022.53, subd. (e)(1)(A)).

"'On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find

the defendant guilty beyond a reasonable doubt. [Citations.]' " (*People v. Cravens* (2012) 53 Cal.4th 500, 507 (*Cravens*).) The same standard applies to our review of evidence to support a gang enhancement finding. (*People v. Catlin* (2001) 26 Cal.4th 81, 139, overruled on another ground in *People v. Nelson* (2008) 43 Cal.4th 1242.)

Section 186.22, subdivision (f) defines a " 'criminal street gang' " as "a group of three or more persons" that has as "one of its primary activities the commission of one or more of the criminal acts enumerated" in the statute. A criminal street gang must also have "a common name or common identifying sign or symbol" and its members must "engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

1. Primary Activities Element

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.]" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) Expert testimony may be used to establish that one of the group's primary activities is the commission of statutorily enumerated offenses. (*Id.* at p. 324.) However, such testimony must be based on reliable information. Thus, a gang expert may base his opinion regarding a gang's primary activities on conversations with gang members, his personal investigation of crimes committed by gang members, and information provided by his colleagues. (*People v. Gardeley* (1996) 14 Cal.4th 605, 620 (*Gardeley*).)

Here, Officer Balaoro testified as an expert regarding criminal street gangs in Salinas. In 2007, he was a member of the Violence Suppression Unit, commonly referred to as the gang unit, and his duties included gathering intelligence regarding gang activity. Officer Balaoro had received over 124 hours of formal gang training. He also talked to active gang members on a daily basis, both in a custodial setting and in "casual conversation[s]." He had participated in a "large number" of gang investigations, had made gang arrests, and was involved in serving search warrants on gang members.

Though his work included both Norteno and Sureno gangs, his colleagues referred to him as "the Sureno expert, specifically the Hebbron expert" because he "knew everybody in Hebbron." He testified that the "primary activities for a Sureno criminal street gang [are] to steal cars, sell drugs. They do this in order to buy guns. That's to retaliate or protect themselves against rival gang members such as the Nortenos."

Though defendant acknowledges that the sale of drugs is specified in section 186.22, he argues that Officer Balaoro's testimony was insufficient to prove the primary activities element. He asserts that the officer "failed to provide any specifics as to how, where or when the alleged drug dealing occurred."

Defendant's relies primarily on *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*). In that case, the expert witness testified that Varrio Viejo members committed crimes such as assault with a deadly weapon, murder, and narcotics violations. (*Id.* at p. 611.) In concluding that there was insufficient evidence to support the gang enhancement, the Court of Appeal reasoned: "Lang's entire testimony on this point is quoted above—he 'kn[e]w' that the gang had been involved in certain crimes. No specifics were elicited as to the circumstances of these crimes, or where, when, or how Lang had obtained the information. He did not directly testify that criminal activities constituted Varrio Viejo's primary activities. Indeed, on cross-examination, Lang testified that the vast majority of cases connected to Varrio Viejo that he had run across were graffiti related. [¶] Even if we could reasonably infer that Lang meant that the primary activities of the gang were the crimes to which he referred, his testimony lacked an adequate foundation. 'The requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and *be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates.* [Citations.]' [Citation.] . . . We cannot know whether the basis of Lang's testimony on this point was reliable, because

information establishing reliability was never elicited from him at trial." (*Alexander L.*, *supra*, 149 Cal.App.4th at p. 611, fn. omitted.)

The present case is distinguishable from *Alexander L*. Here, Officer Balaoro testified regarding his gang training, his daily conversations with gang members, and his participation in gang investigations of Surenos in Salinas. As in *Gardeley*, *supra*, 14 Cal.4th at p. 620, this testimony provided a reliable basis for the officer's expert opinion as to the Surenos' primary activities. Defendant argues that Officer Balaoro, unlike the expert witness in *Gardeley*, "did not directly tie his opinion to his prior investigatory activities." However, the trier of fact could reasonably draw this inference from Officer Balaoro's testimony. (See *Cravens*, *supra*, 53 Cal.4th at p. 507 [a reviewing court must presume in support of the judgment every fact reasonable from the evidence].) Thus, there was substantial evidence to support the primary activities element of section 186.22, subdivision (f).

2. Pattern of Criminal Gang Activity Element

"A gang engages in a 'pattern of criminal gang activity' when its members participate in 'two or more' statutorily enumerated criminal offenses (the so-called 'predicate offenses') that are committed within a certain time frame and 'on separate occasions, or by two or more persons.' [Citation.]" (*People v. Zermeno* (1999) 21 Cal.4th 927, 930.)

Defendant does not challenge the sufficiency of the evidence of the predicate offenses. He argues that "Officer Balaoro did not provide any factual basis for his opinion that the men were Surenos."

Defendant relies on *In re Nathaniel C.* (1991) 228 Cal.App.3d 990 (*Nathaniel C.*). In that case, when testifying about the pattern of criminal gang activity, "[t]he witness, a South San Francisco police officer, had no personal knowledge of the incident and only repeated what San Bruno police told him they believed about the shooting. Such vague,

second hand testimony cannot constitute substantial evidence that the required predicate offense by a gang member occurred." (*Id.* at p. 1003.)

Nathaniel C. is inapposite. Here, Officer Balaoro testified that he was familiar with Chavez and Cervantes and both men were Sureno gang members on February 25, 2007, when they committed an attempted murder. Officer Balaoro also testified that he was familiar with Martinez, who was a Sureno gang member on July 28, 2005, when he committed an unlawful shooting. Given Officer Balaoro's gang training, his daily conversations with gang members, his participation in gang investigations of Surenos in Salinas, and his familiarity with Chavez, Cervantes, and Martinez, there was an adequate foundation for his opinion that they were Sureno gang members. (*Gardeley*, *supra*, 14 Cal.4th at p. 620.) Accordingly, there was substantial evidence to support the pattern of criminal gang activity element of section 186.22.

B. Count Eight

Defendant also contends that he was deprived of due process when the trial court imposed punishment on count eight under section 186.22, subdivision (b)(4)(C) rather than section 186.22, subdivision (b)(1).

Count eight of the information charged defendant with a violation of section 136.1 (dissuading a witness). The information also charged a gang allegation pursuant to "section 186.22 (b)(1)" in connection with this offense. The trial court returned a guilty verdict on count eight and found the gang allegation to be true. At the sentencing hearing, the trial court imposed a sentence of 14 years to life on count eight under section 186.22, subdivision (b)(4)(C).[5]

[5] The term of seven years to life was doubled since the trial court found a strike conviction to be true.

Section 186.22, subdivision (b)(1) mandates additional determinate terms for gang-related offenses "[e]xcept as provided in paragraphs (4) and (5) . . . ."[6] Subdivision (b)(4) requires an indeterminate term for various gang-related offenses and specifies the minimum terms in subsequent subsections.[7] Subsection (b)(4)(C) states the minimum term as seven years for "threats to victims or witnesses, as defined in Section 136.1." Both subdivisions (b)(1) and (b)(4) apply when the underlying crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1), (4).)

"'Due process requires that an accused be advised of the specific charges against him so he may adequately prepare his defense and not be taken by surprise by evidence offered at trial. [Citations.]'" (*People v. Mancebo* (2002) 27 Cal.4th 735, 750 (*Mancebo*).)

---

[6] Section 186.22, subdivision (b)(1) provides: "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] (A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion. [¶] (B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

[7] Section 186.22, subdivision (b)(4) provides: "Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: [¶] . . . [¶] (C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1."

Here, the information did not expressly allege that defendant was subject to an indeterminate sentence of seven years to life under section 186.22, subdivision (b)(4). However, the information alleged every fact necessary to place defendant on notice of what conduct he had to defend against as well as the punishment set forth in subdivision (b)(4). The information alleged defendant dissuaded a witness "for the benefit of, at the direction of, or in association with SURENO CRIMINAL STREET GANG, with the specific intent to promote, further, or assist in any criminal conduct by gang members." Thus, the information alleged the operative language in subdivision (b)(1) which was identical to the language in subdivision (b)(4), and consequently defendant was notified of the specific charges against him. He was also notified of the potential indeterminate sentence. Section 186.22, subdivision (b)(1) sets forth various sentencing options "except as provided in paragraphs (4) and (5)[.]" Paragraph (4) applies when a defendant is convicted of dissuading a witness. Thus, the information provided notice to defendant that he would be punished under subdivision (b)(4) if he were convicted of dissuading a witness and the gang enhancement were found true. Accordingly, defendant was not deprived of due process.

Mancebo, *supra*, 27 Cal.4th 735 does not compel a contrary conclusion. In *Mancebo*, the information charged the defendant with several offenses arising from sexual assaults on two victims on separate occasions. (*Mancebo*, at p. 740.) The information also alleged that the defendant was eligible for a life sentence under section 667.61 due to three circumstances: kidnapping; firearm use; and binding of the victim. (*Mancebo*, at p. 740.) The information further alleged enhancements for personal gun use pursuant to section 12022.5. (*Mancebo*, at p. 740.) The jury found the defendant guilty as charged and found all the enhancements to be true. (*Ibid.*) Recognizing that section 667.61 precluded the gun use from being employed under both sections 667.61 and 12022.5, the trial court substituted the unpled circumstance under section 667.61 that the offenses involved multiple victims, and imposed sentence under both sections 667.61

and 12022.5. (*Mancebo*, at p. 740.) *Mancebo* found a violation of due process, explaining that "no factual allegation in the information or pleading in the statutory language informed defendant that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing under section 667.61, subdivision (a). Thus, the pleading was inadequate because it failed to put defendant on notice that the People, for the first time at sentencing, would seek to use the multiple victim circumstance to secure indeterminate One Strike terms under section 667.61, subdivision (a) *and* use the circumstance of gun use to secure additional enhancements under section 12022.5(a)." (*Mancebo*, at p. 745.)

In *Mancebo*, the fact that there were multiple victims was insufficient to notify the defendant that he could be sentenced under an unpled circumstance under section 667.61. In contrast to *Mancebo*, here, the enhancement in the information specifically pleaded the same facts under section 186.22, subdivision (b)(1) that would have been pleaded under section 186.22, subdivision (b)(4). Moreover, unlike in *Mancebo*, given that subdivision (b)(1) specifically referenced subdivision (b)(4), defendant was put on notice of the punishment outlined in subdivision (b)(4). *Mancebo* also observed that section 667.61 required that a circumstance be pleaded and proved. (*Mancebo*, *supra*, 27 Cal.4th at pp. 743-744.) There is no similar requirement in section 186.22, subdivision (b)(4). Thus, *Mancebo* is not controlling in the present case.

Defendant also relies on *People v. Botello* (2010) 183 Cal.App.4th 1014 (*Botello*). *Botello* rejected the People's contention that "the firearm findings under section 12022.53, subdivisions (b), (c), and (d) [could] be saved by applying, for the first time on appeal, the uncharged provision of section 12022.53, subdivision (e)(1)." (*Botello*, at p. 1017.) *Botello* reasoned: "[A]pplying section 12022.53, subdivision (e)(1), which was not charged, would violate the language of that subdivision (which requires that it be pled) and the notice requirement of due process. We also conclude that by its failure to plead subdivision (e)(1), failure to ensure jury findings under that subdivision, failure to

raise the provision at sentencing, and obtaining a sentence that in fact violated subdivision (e)(1), the prosecution forfeited its right to rely on that subdivision." (*Botello*, at p. 1017.)

Botello is readily distinguishable from the case before us. First, as previously stated, section 186.22, subdivision (b)(4) does not require that it be pleaded in the information. Second, in *Botello*, the information pleaded enhancement allegations that required personal use of a firearm (§ 12022.53, subds. (b), (c), and (d)), but the People sought to substitute a sentencing enhancement that did not require personal use (§ 12022.53, subd. (e)). Unlike in *Botello*, here, the information alleged the same facts that would have been alleged under section 186.22, subdivision (b)(4). Third, the issue was raised at sentencing and the sentence imposed did not violate subdivision (b)(4). Thus, *Botello* does not support defendant's position.

In sum, since section 186.22, subdivision (b)(1) explicitly refers to subdivision (b)(4) and the factual allegations in the two subdivisions are identical, the trial court did not err by imposing sentence pursuant to section 186.22, subdivision (b)(4).

C. Abstract of Judgment

Defendant contends, and the People concede, that the abstract of judgment must be corrected.

The trial court stated that defendant's minimum eligibility for parole was 77 years. The clerk's transcript and the abstract of judgment record that figure. However, the trial court sentenced defendant to 67 years to life, which was calculated as follows: (1) 39 years to life on count one (14 to life for the attempted murder conviction and 25 years to life for the gun use); (2) 14 years to life on count three; and (3) 14 years to life on count eight. Thus, the abstract of judgment must be amended to reflect a sentence of 67 years to life on counts one, three, and eight. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185

(*Mitchell*) [appellate court has the authority to order the trial court to correct clerical errors in the abstract of judgment].)

In count nine, defendant was convicted of attempt to solicit perjury (§§ 664, 653f, subd. (a)). However, the abstract of judgment reflects a conviction for attempt to solicit murder (§§ 664, 653f, subd. (b)). Accordingly, the abstract of judgment must be amended. (*Mitchell*, *supra*, 26 Cal.4th at p. 185.)

III. Disposition

The trial court is directed to amend the abstract of judgment to reflect a sentence of 67 years to life on counts one, three, and eight, and that defendant was convicted in count nine of attempt to solicit perjury (§§ 664, 653f, subd. (a).) In all other respects, the judgment is affirmed.

_____
Mihara, J.

WE CONCUR:

_____
Bamattre-Manoukian, Acting P. J.

_____
Duffy, J.*

---

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.